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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2006

LLOYD BARRENTINE, CLYDE G. EDWARDS, CLEO KEENEY, MAXIE BLANTON, JOHNNY ROBINSON, CHARLEY DEATON, H.E. MITTCHELL, AND L.R. YOUNG,
Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN, LOCAL 878, AND A.J. PICKERING, PRESIDENT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June 19, 1980

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Lloyd Barrentine, *et al.*, respectfully petition this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, entered in this proceeding on February 20, 1980.

OPINIONS BELOW

The opinion of the district court, which is not officially reported, is set forth at pages 1a-13a. The opinion of the court of appeals is reported at 615 F.2d 1194 and is set forth at pages 14a-31a.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1980. Mr. Justice Blackmun entered an order on May 9, 1980, extending the time to file this petition until June 19, 1980. Accordingly, this Court has jurisdiction to review the court of appeals' judgment pursuant to 28 U.S.C. § 1254(1).

STATUTE AND CONTRACTUAL PROVISIONS INVOLVED

Section 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(b), provides, *inter alia,* that

> Every employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce . . . wages . . . not less than the minimum rate in effect under subsection (a)(1) of this section.

Section 5 of Article 44 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> It shall be the function of the . . . [grievance] committees . . . to settle disputes which cannot be settled between the Employer and the Local Union.

Section 1 of Article 45 of the Southern Conference Area Over-the-Road Supplement to the Teamster National Master Freight Agreement provides, *inter alia,* that:

> The Union and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of

> settlement as provided for in this Agreement, and in the National Agreement, if applicable, of any controversy which might arise . . . .

QUESTION PRESENTED

Does an employee's prior submission of his contractual claim for wages for hours worked to a grievance committee, as required by his collective bargaining agreement, foreclose a federal court from reviewing a subsequent claim under the minimum wage provisions of the Fair Labor Standards Act ("FLSA") where the FLSA claim was not in fact submitted to or passed upon by the grievance committee?

STATEMENT OF THE CASE

A. Facts

All interstate commercial motor carriers and drivers are subject to the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 390 *et seq.*, promulgated by the U.S. Department of Transportation ("DOT") under the authority of the Interstate Commerce Act, 49 U.S.C. § 304. Those regulations require, among other things, that before embarking on an over-the-road trip, a driver must perform a safety inspection of his vehicle and refrain from driving it if mechanical defects are discovered. 49 C.F.R. §§ 392.7, 396.4 (1979).

Despite the critical importance of these inspections, Arkansas-Best Freight System ("ABF") has long maintained that it is not required to compensate the drivers based in its Little Rock, Arkansas terminal for the time they spend conducting the inspection and, when necessary, taking the vehicle to the company's repair facility. Two of the

drivers, petitioner Lloyd Barrentine and Jimmy Scates, filed several grievances, the first in 1969, alleging that ABF's failure to pay for the time they devote to pre-trip inspections violated their collective bargaining agreement.[1] Under the terms of the collective bargaining agreement, "any controversy which might arise" must be submitted to a Joint Grievance Committee. These grievances were presented by their Local Union, Local 878 of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen ("Local 878"), to the Joint Grievance Committee, composed of three union and three management representatives. As the district court found, despite the fact that the unpaid time falls within the literal terms of their contract with ABF which requires compensation for "the full time spent in the service of the Employer," the Grievance Committee rejected their claims. No written decision was issued, and there are no records of the grievance proceedings; however, ABF and Local 878 concede that only the contractual claim was submitted to, or considered by, the Grievance Committee.

B. The Proceedings Below

In March 1977, the two unsuccessful grievants, joined by four other ABF drivers, brought an action in the United States District Court for the Eastern District of Arkansas to obtain pay for the time spent conducting pre-trip safety inspections and taking unsafe vehicles to the company's repair facility. Both ABF and Local 878 were named as defendants, as was the Local's president, A.J. Pickering. In the first count of their complaint, plaintiff alleged that the time at issue was compensable under

[1]Although Mr. Scates was initially a plaintiff in this action, he recently has been elected an officer of Local 878 and has filed a motion with the district court for leave to withdraw.

the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, ("FLSA"), and hence plaintiffs were entitled to double damages, plus costs and attorney's fees. In the second count, plaintiffs asserted that Local 878 had breached its duty of fair representation by entering into a "side deal" with ABF to avoid payment, and therefore the grievance awards barring compensation should be set aside and plaintiffs be awarded proper compensation under the contract.

Following a bench trial, the district court issued an oral ruling. The court first found that "[t]here is no question that the driver when [inspecting the truck and driving it to the repair facility] is on the employer's business; at least, no question in my mind." (4a) The court was also persuaded that ABF paid its drivers for performing DOT safety checks at its other terminals and that other companies subject to the collective bargaining agreement did the same (4a). Nonetheless, the court refused to award plaintiffs judgment on their contract claim. Instead, it concluded that while "the evidence seems . . . rather to predominate in favor of the finding that there was a side agreement," such an agreement was not necessarily improper since the labor laws allow "parties by their own actions . . . [to] fill in gaps that always arise with a written instrument when you apply that instrument in a multiplicity of situations and practices." (8a) Based on these findings, the district court dismissed the action with prejudice. The court, however, did not address, much less issue a ruling on, plaintiffs' FLSA claim.

On appeal, the Eighth Circuit unanimously affirmed the district court's rulings on the contract claim, finding that the Grievance Committee decisions were not "tainted" by the side deal, if one existed (30a).[2] Turning to petitioners'

[2]No review is sought on that ruling.

FLSA claim, a divided court held "that wage disputes, arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides . . . at least in situations where the employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement." (23a) In so ruling, Judge Henley, writing for himself and District Judge Schatz, rejected plaintiffs' contention that the rationale of this Court's decision in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), applies with equal force to claims arising under the FLSA (24a). The majority purported to distinguish *Alexander v. Gardner-Denver* on the ground that "simple wage dispute[s]" do not involve the same public policy considerations that are present in Title VII cases (25a).[3]

Judge Heaney dissented from the court's FLSA ruling, finding the majority opinion in conflict with *Alexander v. Gardner-Denver, supra.* Judge Heaney stated that since "there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration", he would have remanded the case for resolution of the FLSA claims (30-31a).

---

[3]While troubled by the fact that four of the plaintiffs did not file grievances, the court held that they too were precluded from pursuing an FLSA remedy since no objection had been lodged to the district court's "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." (26a)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS, AND HAS THE POTENTIAL FOR SERIOUSLY UNDERMINING THE GOALS OF THE FLSA.

The FLSA sets out a strict policy of guaranteed compensation for workers covered by the Act, and confers a right to at least the minimum wage for all hours worked – a right which cannot be abridged by contract or otherwise prospectively waived. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 706-708 (1945); *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123,* 321 U.S. 590, 597, 601-603 (1944). To enforce FLSA rights, Congress has armed workers with a broad right to file suit, and vested both federal and state courts with plenary authority to enforce the statutory requirements. 29 U.S.C. § 216(b). And to encourage employees to vindicate their rights, Congress has mandated the award of double damages and reasonable attorneys' fees in all cases where the plaintiff prevails. *Id.* To further ensure effective enforcement, Congress has authorized the Secretary of Labor to bring both injunctive and back pay actions on behalf of workers. 29 U.S.C. § 216(c).

The decision below, if allowed to stand, constitutes a serious barrier to the attainment of the goals of the Fair Labor Standards Act. According to the Eighth Circuit, workers who submit contract-based wage claims to arbitration or a grievance committee, either voluntarily or because of compulsory grievance procedures in their contracts, are barred from going to court to vindicate their independent, statutory right to at least minimum wage compensation for all hours worked. Court review is foreclosed

for even those workers, like petitioners, who never intended to submit their FLSA wage claims to a grievance committee, nor had the committee pass on the merits of their FLSA claims. Because this result is antithetical to the purpose of the FLSA, inconsistent with this Court's decision in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974), and in conflict with decisions of this and other courts, the Court should grant this petition.

1. In ruling that submission of a wage claim to a grievance committee bars access to the courts to vindicate rights secured by the FLSA, the court below strayed far from the teachings of this Court in *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974). There, the Court held that in Title VII cases, federal courts were not foreclosed from examining *de novo* claims of racial discrimination, even where the underlying claim had been the subject of binding arbitration under the anti-discrimination provisions of a collective bargaining agreement.

The rationale underlying the non-deferral principle in *Gardner-Denver* applies with equal force in the FLSA context. Title VII and the FLSA are congruent in all critical respects. Both are remedial statutes which accord employees distinct and independent rights; both are legislative schemes to protect workers as individuals; both vest ultimate enforcement responsibility in the courts; both depend primarily upon private enforcement actions (though both also authorize the United States to bring suits on behalf of affected workers); and both confer rights which cannot be prospectively waived. Despite the unmistakable parallels between the statutes, the court below rejected application of *Gardner-Denver,* asserting, without explanation, that since the FLSA involves "simple wage claims," which have traditionally been the subject of arbitration, deferral was appropriate (25a).

There are several reasons why the distinction between Title VII and the FLSA forged by the court below is erroneous. First, it is not the role of the courts to measure the importance of different remedial statutes enacted by Congress and effectively undermine the enforcement schemes of those considered of lesser importance. Second, the court's ruling that FLSA claims are somehow worthy of less demanding protection than Title VII claims is devoid of support. Congress has never declared that eradicating discrimination through Title VII is a more pressing social goal than ensuring through the FLSA that workers are not forced to work excessive hours, work without compensation, or be denied overtime payments. Indeed, this Court has long recognized the vital policy underpinnings of the FLSA. *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra,* 321 U.S. at 602-603. Third, in both cases, the role of the courts is vital. Questions of statutory coverage, exemptions, and wage calculations, which often arise in FLSA suits, are no more suited for arbitration than are the issues of statutory construction which are presented in Title VII cases.

Most important, however, any suggestion that the arbitration process is better suited to enforce FLSA rights than it is to protect rights under Title VII is without foundation. As this Court has often seen, contract provisions may well cut-back on the rights guaranteed by the FLSA. *See, e.g., Overnight Motor Transport Co. v. Missel,* 316 U.S. 572 (1943); *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra; see also United States v. Barnette,* 546 F.2d 187, 189 (5th Cir. 1977). Yet, as the Court noted in *Gardner-Denver,* the role of an arbitrator or Grievance Committee is "to effectuate the intent of the parties" not enforce "the requirements of enacted legislation." Nor can arbitrators or grievance committees em-

ploy the broad range of remedies available to a court, or award the double damages and attorneys' fees the FLSA requires. Thus, grievance procedures provide no more a bulwark to protect FLSA rights than they do to protect Title VII rights. Absent meaningful access to the courts, employers and unions will be free to alter or abrogate altogether rights set forth in the FLSA, while employees remain powerless to enforce those rights. This result, inevitable under the Eighth Circuit's ruling, is antagonistic to the intent underlying the FLSA and in conflict with the thrust of the Court's ruling in *Gardner-Denver*. Accordingly, review should be granted to correct the decision below.

The decision below is also at odds with the decision of this Court in *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123, supra*. There, in language equally apt here, the Court admonished that in enacting the FLSA

> Congress intended . . . to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.

321 U.S. at 602-603. *Accord, Brooklyn Savings Bank v. O'Neil, supra*. In the face of this well-settled principle of law, the Eighth Circuit's ruling effectively insulates from scrutiny an agreement which plainly "deprive[s] employees of their statutory right[ ]" to compensation. Because the Eighth Circuit's ruling is also in conflict with *Tennessee Coal*, this Court should grant review.

The ruling of the court below, that where, as here, the collective bargaining agreement provides for submission of all disputes between the parties to a grievance committee, FLSA wage claims "may be the subject of binding arbitration," also cannot be squared with the Court's decision in *U.S. Bulk Carriers v. Arguelles,* 400 U.S. 351 (1970). In a virtually identical setting, this Court in *Arguelles* held that resort to grievance machinery is not required before a seaman can assert a claim under the Seaman's Wage Act, 46 U.S.C. § 596, which regulates the pay of maritime workers. The Court's holding in *Arguelles* was predicated on two factors: (1) that the seaman was seeking to vindicate an independent statutory right which was part of a legislative scheme to protect seamen as individuals; and (2) that the remedies available through the grievance procedure were far less comprehensive than those provided for by statute. Despite the presence of both of these factors in this case and the strong similarities between the statutes, the court below failed to adhere to the Court's ruling in *Arguelles.* For this reason as well, review should be granted.

2. In ruling that "wage disputes arising under the FLSA . . . may be the subject of binding arbitration where the collective bargaining agreement so provides," the court of appeals reached the opposite conclusion from that of the Iowa Supreme Court in *Thompson v. Iowa Beef Packers, Inc.,* 185 N.W. 2d 738,742 (Ia. 1971):

> We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifested in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen have free access to the courts in FLSA cases.

This Court granted certiorari in *Iowa Beef Packers* to decide whether exhaustion should be required, but dismissed the writ as improvidently granted when it developed at oral argument that the collective bargaining agreement applied only to "grievances pertaining to a violation of the Agreement." 405 U.S. 228, 230 (1972). Because the collective bargaining agreement here requires submission of "any controversy," the exhaustion issue is squarely presented in this petition. *But see Union de Tronquistos de Puerto Rico Local 901 v. Flagship Hotel Corp.*, 554 F.2d 8 (1st Cir. 1977); *Satterwhite v. United Postal Service,* 496 F.2d 448 (10th Cir. 1974), *cert. denied,* 419 U.S. 1079 (1975).

The Eighth Circuit's approach also cannot be reconciled with that taken by the Seventh Circuit in its recent decision in *Marshall v. N.L.Industries, Inc.*, No. 78-2289 (April 7, 1980). There a unanimous court found *Alexander v. Gardner-Denver* controlling in holding that a prior arbitration award did not bar a subsequent suit under the Occupational Safety and Health Act. 29 U.S.C. § 660(c)(1). Although the court expressly recognized the Eighth Circuit's contrary ruling here, *see* slip op. at 5 n.5, it nonetheless followed *Gardner-Denver.* In light of the divergent constructions placed on the scope of *Gardner-Denver* by the circuits, this Court should grant review.

To the extent that the decision of the court below bars suits by even those employees who did not file grievances, it is also in conflict with both circuit court and state court decisions. The weight of authority holds that even where the collective bargaining agreement provides for arbitration, employees may elect to bring their FLSA claim directly to the courts. *Leone v. Mobil Oil Co.,* 523 F.2d 1153 (D.C. Cir. 1975); *Martinez v. Commonwealth Oil Refinery,* 17 WH 262 (Sup. Ct. of Puerto Rico 1965), *cert.*

denied, 383 U.S. 936 (1966); *Abbott v. Beatty Lumber Co.,* 282 N.W.2d 369 (Mich. App. 1979); *cf. U.S. Bulk Carriers v. Arguelles, supra. But see Beckley v. Teyssler,* 332 F.2d 495 (9th Cir. 1964).

In this case, it is undisputed that four of the petitioners never filed grievances. Despite that fact, the court below ruled that they too were barred from litigating their FLSA claims because no objection was lodged to the district court's "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied." (26a) But the district court's remark was made in the context of rejecting defendants' claim that the employees who had not pursued grievances should be dismissed as plaintiffs for failing to exhaust. The court never addressed the question of whether plaintiffs had an independent right to maintain their FLSA action. Yet by dismissing the claims of the four who did not file grievances on the basis of the decisions issued in connection with the grievances filed by Barrentine and Scates, the courts below deprived four petitioners of any redress whatsoever for their statutory claim, and in so doing created a conflict with the decisions of the D.C. Circuit and several state courts.

3. The ruling of the court of appeals will also impede the effectuation of the policies of the FLSA. Here, there can be little dispute that the FLSA requires compensation. The time spent by ABF's drivers in checking their vehicles and driving them to the repair shop is "an integral and indispensible part of the principle activity of the employer", and hence compensation is required. *Steiner v. Mitchell,* 350 U.S. 247, 252 (1956); *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946). Indeed, the district court held that there was "no question" that these were hours worked, a finding expressly endorsed by the court of ap-

peals. To allow a grievance award to stand as an absolute bar to court review can only serve to undermine the "national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." *Tennessee Coal, supra,* 321 U.S. at 602-603.

The conclusion reached by the Eighth Circuit may also create further difficulties in enforcing the FLSA. Although the FLSA depends primarily upon individual enforcement efforts, the Secretary of Labor is also empowered to bring actions under the FLSA upon request by an employee. 29 U.S.C. § 216(c). Since the Secretary's power to bring an action derives from the rights of an aggrieved employee, the Eighth Circuit's ruling might well be read to foreclose an action by the Secretary where the employee has either filed a grievance on a related wage claim, or is subject to a collective bargaining agreement which requires submission of all disputes.

An analogous argument was raised recently before the Seventh Circuit in *Marshall v. N.L. Industries, Inc.,* No. 78-2289 (April 7, 1980). There the defendant contended that a suit by the Secretary of Labor under the Occupational Safety and Health Act on behalf of an employee was barred by prior submission of the underlying dispute to arbitration. Although the Seventh Circuit rejected the argument, it did so relying on the non-deferral principles of *Alexander v. Gardner-Denver* – an approach specifically rejected by the court below. Accordingly, under the court of appeals decision here, it remains an open question as to whether the Secretary of Labor could institute an enforcement action against ABF – particularly if it was relying upon the request of one of the petitioners. Because the decision below thus may well constitute a serious limit upon the Secretary's authority to enforce the

FLSA, as well as on the right of individual employees to maintain FLSA suits, this Court should grant review.

Unless promptly remedied by this Court, the uncertainty engendered by the conflicting decisions in this area will inevitably take a harsh toll on employees who believe that their FLSA rights are being violated. Employees who determine initially to file suits, as the FLSA literally allows, are placed in the unenviable situation of having to risk dismissal for failing to exhaust grievance procedures, thereby wasting time and money. On the other hand, employees who pursue their claims through the grievance process may well be held to have irrevocably waived their right to have a court review their FLSA claim. In that event, even should they prevail in the grievance process, they would not have an opportunity to be awarded double damages and attorneys' fees as the FLSA mandates. At the very least, in either case, the employees risk running afoul of the statute of limitations of the FLSA or the contractual grievance provisions. *See* 29 U.S.C. § 255. Accordingly, a definitive ruling by this Court is warranted both to clarify this issue of law and eliminate the obvious potential for extensive litigation now posed by the dilemma in which the decision below places employees.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 19, 1980

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION
_____oOo_____

LLOYD BARRENTINE, et al, PLAINTIFFS

vs. LR-C-77-85

ARKANSAS BEST FREIGHT SYSTEMS, INC., et al DEFENDANTS.

REPORTER'S PARTIAL TRANSCRIPT

OPINION OF THE COURT

Little Rock, Arkansas
Friday, May 4, 1979

BEFORE HONORABLE RICHARD S. ARNOLD
United States District Judge

APPEARANCES

For the Plaintiffs:	MR. JOSH E. McHUGHES and MR. J.H. COTTRELL 316 Izard – 501-376-9131 Little Rock, Arkansas
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For Teamsters Local 878:	MELVA H. KOZINSKY Tower Building Little Rock, Arkansas

LITTLE ROCK, ARKANSAS, FRIDAY, MAY 4, 1979, 1:00 O'CLOCK P.M.

COURT CRIER: All please rise. The United States District Court for the Eastern District of Arkansas is once again in session. Please be seated and come to order.

THE COURT: Since all of the parties have rested the case is now ready for a decision, and the Court will now deliver its Opinon.

To begin with, the Court has jurisdiction of the case under Section 301 of the Labor Management Relations Act of 1947, and under Section 1331 of the Judicial Code, the General Federal Questions Division.

The claim presented arises under two federal statutes, Section 301 which I have already mentioned, the Minimum Wage Act or the Fair Labor Standards Act, 29 USC Section 216(b).

The parties remaining in the case on the plaintiffs' side are six in number and they are named in the caption of the Complaint; three of the plaintiffs have been dismissed with prejudice on motion of the defendants and with the consent of counsel for the plaintiffs at the beginning of the trial. The defendants are Arkansas Best Freight System, Inc., a trucking company, International Brotherhood of Teamsters, Local 878, a labor organization.

The question in the case has to do with whether or not the six named employees are entitled to be paid for a certain period of time that the parties have customarily referred as the pre-trip inspection time, or the DOT inspection time. This period of time occurs between what has been called punch-out and what has been called punch-in; that is, when the driver appears at a terminal to begin a trip, having been called in, his first duty is to pick up what they have referred to as the bills, that is, a manifest showing where the trip is going and other necessary facts. At that point the driver punches a clock. That is referred to as

punching out; he then goes to see if his vehicle, that is, the tractor and trailer that he is going to drive is in good enough shape to make the trip.

At this point under Section 392.7 of the Department of Transportation Regulations the driver is obligated to check the unit and the regulations list certain specific items that are to be checked. If the unit checks out, the driver gets in it and drives away and proceeds on his trip, for which under this contract he is paid at a mileage rate, providing, however, that he shall not be paid less than eight hours time.

If the unit does not check out, he takes it to be repaired at a repair shop belonging to the company and on the premises of the company, and when he arrives at the repair shop he punches in, that is, there is a second clock. And, of course, I am referring here to the Little Rock terminal only of Arkansas Best Freight, because that's the location about which this dispute has arisen.

The truck is then repaired, and the actual time consumed in repairs, that is, between the time of punching in at the repair shop and the time that the truck is released to the driver, having been repaired, that time is paid for and there is no dispute about that.

There is also no dispute that the time consumed by a pre-trip inspection is not paid for if the vehicle checks out, because in that instance the driver simply drives away; he does not punch in or log time in any way. So, the question has to do with the period between punching out and punching in in those instances where the driver has found something wrong with the unit.

There has been a good deal of dispute in the case as to whether or not it is ABF's practice in other terminals to

pay for this time. The Court is persuaded that it probably is the practice at other terminals to pay for the time.

It is true that the exhibits that have been introduced with respect to that issue are somewhat ambiguous, but the Court believes that other terminals do pay for this time, or at any rate that is going to be assumed as part of the basis for this decision.

The Court also is going to assume that other truck lines, specifically Strickland, pays for this time. The practice at Strickland is somewhat different; it appears to be a more or less arbitrary rule there, but fifteen minutes of this time is paid for regardless of how much time is actually consumed.

But, again, for the sake of the argument, the Court assumes that Strickland pays for the time and that is the regular practice.

So, what we have, initially at least, is a question of whether or not under Article 50 of the Collective Bargaining Agreement this time is time spent in the service of the employer. If this were an ordinary contract action involving not a Collective Bargaining Agreement but some other kind of contract, the Court would be strongly inclined to rule in favor of the employees. It is difficult for me to see, based only upon the wording of the contract, why this time is not in the service of the employer. It is true that the DOT Regulations places upon a driver personally the obligation of seeing that the unit is properly operating. There is no question that the driver when doing so is on the employer's business; at least, no question in my mind.

And, in addition, it can be argued that it is the employer's duty if that unit is on the ready line to see that it is already in shape.

But this is not an ordinary contract action between private parties. This is an action on a Collective Bargaining Agreement, and the rules are quite different in construing and defining those agreements from the rules applicable in an ordinary contract case.

So, it is appropriate at this point to summarize briefly what the rules are with respect to Collective Bargaining Agreements.

To begin with, Congress has clearly specified in Section 203(b) of the Act of 1947, and I am quoting, "That final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes", 29 USC Section 173 (d).

There is such a method specified in this contract. Article 44 of the contract sets up a procedure for the handling of disputes as to contract interpretation called a "Grievance Procedure". Under this procedure an employee who believes that he has been mistreated can file a grievance with his Local Union, and it then becomes the duty of the Union to process that grievance with a Joint Committee; by "Joint" I mean the employers and the Union; called the Southern Multistate Grievance Committee. The Committee has sat at various locations, Buloxi, Dallas and Memphis have been mentioned. That Committee is composed of six members, three representing the management side and three representing the Union's side. None of the members in a case involving ABF and Local 878 would be either employees of ABF or members of Local 878.

If that Grievance Committee decides the case by a majority vote, that is, at least four members concurring, under Article 44 of the contract the decision is final and binding on the parties. If on the other hand the Grievance Committee splits three to three, then there is a further pro-

cedure specified in the contract for resolution of the deadlock. There is no contention that the deadlock provisions ever came into play in this case because there was no deadlock.

In any case, the evidence is clear that there were grievances presented from time to time with respect to this issue. Two of the named plaintiffs, Mr. Barrentine and Mr. Scates actually presented grievances and those grievances were denied, that is, the committee decided that the grievances were not well taken. The committee decided that under the contract the money was not owed.

The other four employees did not actually present grievances. The defendants have argued that their claims should be dismissed because of failure to exhaust their remedies under the contract. This Court does not agree with that attitude. The Court finds that the grievances were not presented because it would have been a futility to present them. It was well known what the committee was ruling and there was no reason for the other employees to waste their time and paper by filling out grievances when the result was clear in advance.

So, the Court is treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied.

There is no evidence that a grievance was actually rejected, that is, there is no evidence that a grievance was ever taken to the Union and the Union official refused to take it. The claim rather is that the Union officials during a certain period of time before January 19, 1974 were perfunctory, or acted in bad faith, or did not properly represent the interests of the employees in pursuing these grievances, and there is some evidence to support that in a general way. There apparently was a good deal of animosi-

ty between Mr. Odell Smith, the former president of the Union, and some of the employees, especially employees of ABF. That animosity ultimately resulted in an election in which Mr. Pickering, the present president of the Union succeeded Mr. Smith. The general feeling that has been expressed by the plaintiffs is that Mr. Smith was rather uncooperative, and is a feeling that the Court understands.

The fact remains, however, that the grievances were taken to the Multistate Committee and were decided by that Committee.

So the question becomes under the controlling Supreme Court precedents whether there is any reason in the evidence to set aside and disregard the findings and holdings of the Grievance Committee. The Supreme Court has admonished the lower Courts that the method of decision set out in the contract is to be honored; that the Congressional policy which I have referred to in quoting from the statute can be effectuated only if the means chosen by the parties for settlement of any differences under a Collective Bargaining Agreement is given full play. The Courts are not to usurp those functions since Collective Bargaining contracts are properly entrusted to the arbitration tribunal, and when the Court speaks of "arbitration" the same principles apply to a grievance procedure such as that as is set out here, because it is, in effect, the same thing.

We are told further that the lower courts should not undertake to review the merits of the arbitration awards and should defer to the tribunal chosen by the parties finally to settle their disputes; otherwise review by a Court of the merits would make meaningless the provisions that the arbitrator stated in his findings. Those are quotations from Hines against Anchor Motor Freight, 424 U.S. 554 at Pages 562 and 563, a case decided by the Supreme Court

in 1976, and apparently the latest precedent that is a comprehensive discussion of the roles of the grievance procedure in this kind of a dispute.

And so the Court has to examine and determine what happened to those grievances, and as far as possible to determine why what happened did happen.

The claim is, essentially, that the grievance procedure was vitiated or that its integrity was undermined because there was a side deal of some kind between the Union represented by Mr. Smith and the employer.

The Court is rather inclined to think that there was a side deal. The testimony is sharply conflicting on that point and the Court is not holding that it disbelieves Mr. Carter. It was not necessarily Mr. Carter who was a party to the side agreement, but the Court is assuming for the sake of argument that there was in fact a side agreement between Mr. Smith for the Local Union under his control and the company.

The Court is particularly persuaded by the testimony of Mr. Pickering on that point. Mr. Pickering didn't say that there was a side agreement and, in fact, said that he had no personal knowledge of it; but when the Court considers the implications of his testimony and the direct testimony of the other employees, the evidence seems to me rather to predominate in favor of the finding that there was a side agreement. So, the Court is going to assume that there was for purposes of further discussion.

Let me say, first of all, that there is no evidence whatever that the side agreement was illegal or improper. There is no evidence, indeed there has been no suggestion, that Mr. Odell Smith received any improper consideration from the company. There is no evidence that the side

agreement was fraudulent. There is no evidence that it was necessarily even improper under the contract.

There are a lot of situations that arise under contracts as there are under statutes where the parties fill in the gaps, so to speak, by making side agreements from time to time. The practice about paying one-quarter hour, for example, even if only eight minutes has been worked but paying nothing if seven minutes has been worked, is a side agreement of sorts. It could be argued that it was directly contrary to Article 50 to pay a man nothing when he has worked seven minutes because Article 50 doesn't say anything about quarter hour increments.

So, side agreements can be, it is possible, made from time to time where the parties by their own actions, explicit or implicit, fill in the gaps that always arise with a written instrument when you apply that instrument to a multiplicity of situations and practices.

In any event, even if there was a side agreement, and the Court is assuming that there was one, and even if it was improper, there is no evidence that the existence of a side agreement had anything to do with the way these grievances were decided by the Committee. For example, we know that grievances were presented by Mr. Barrentine and Mr. Scates after Mr. Pickering became president of the Union and no one has complained that Mr. Pickering behaved improperly, or that the Union has been unresponsive under his leadership. The testimony is all to the contrary.

Specifically, Mr. James French, who handled one of these grievances has had his conduct approved by these plaintiffs, they are not complaining that he did anything improper. So, we have a clearly untainted, you might say,

decision by the Grievance Committee in the post-Smith time period.

Plaintiffs seek to avoid the force of that by arguing that the Committee was decisively influenced by precedent, that is, the argument is that there was a tainted decision of the Grievance Committee during the Smith regime, that the Grievance Committee during the Pickering regime relied upon that tainted precedent, and that, therefore, the entire grievance process under both leaderships is suspect. The Court cannot agree with that argument.

It is true that past precedent was argued to the Committee in the post-Smith grievance hearings, and I feel certain, and I am assuming for present purposes, that the fact that Mr. Barrentine had lost his 1969 grievance was argued to the Committee after Mr. Smith went out as a reason for adhering to the same ruling.

But here we are faced with the direct testimony, which the Court believes, of Mr. William G. Carston who handled the 1969 grievance for the company. His testimony was that the grievance was not perfunctorily presented on either side and that nothing about a side agreement was stated to the Committee. The Court, therefore, concludes that the side agreement, if it existed, did not have any effect on the 1969 grievance decision and that, therefore, any effect that the '69 grievance decision had on the later grievance decision was not improper.

In addition, the testimony of Albert L. Johnson, which the Court also believes, is persuasive. He presented the company's side of the Barrentine and Scates grievances during Mr. Pickering's term, and his testimony is that there was nothing said in the Committee about the side agreement at that point.

So what we have is a decision of the Grievance Committee untainted and uninfluenced by anything about a side agreement.

Why did the Grievance Committee reach the decision that it did? That would be speculation on the Court's part because no reasons were given, but the Court can mention a few factors that may have led the Committee to come to its conclusions.

First of all, there are always disputes about methods of computing time. For example, the Strickland practice of paying for fifteen minutes no matter how much time is actually spent. For another example, the practice at ABF of paying for a quarter hour.

There are questions that arise in the interpretation of the contract that have to be settled one way or the other, and the Court cannot say that the contract is so clear on this point that the Grievance Committee decision was without rational basis.

In addition to that argument there was the point of past practice which is an influential point in this matter. There was the fact that there was another precedent involved, not only the '69 down time precedent, but there was a precedent from the Central States findings under which Case Number 412 involving Mr. Winfield, an employee of East Texas Motor Freight.

So the result is that the Grievance Committee, for reasons sufficient to itself, decided that this time was not spent in the service of the employer within the meaning of the contract.

This Court is not at liberty to substitute its judgment for the judgment of the Grievance Committee. The Commit-

tee was established by the contracting parties to make this kind of decisions, and the Court doesn't have the power to set it aside. If the Grievance Committee had been shown to have been influenced by fraud or impropriety, or if the Union had failed in its duty of fair representation to these employees, or if, perhaps, the decision was so clearly contrary to the language of the contract that some impropriety could be inferred, then the bar of finality attaching in this contract to the Grievance Committee's decision could be voided. The Court finds that none of these requirements is met here. The result that the decision of the Grievance Committee is final and binding and it is a bar to these claims; therefore the Complaint must be dismissed with prejudice.

Mr. McHughes, do you have any question about the Court's ruling, or has anything been omitted?

MR. McHUGHES: No, your Honor.

THE COURT: Miss Kozinski?

MISS KOZINSKI: No, your Honor.

THE COURT: Mr. Maurras?

MR. MAURRAS: No, your Honor.

THE COURT: Judgment will be entered accordingly.

Mr. Marshal, we are in recess.

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CERTIFICATE OF REPORTER

I, Thomas R. Lancaster, Official Court Reporter for the United States District Court for the Eastern District of Arkansas, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the Opinion of the Court had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me to the best of my ability.

/s/ Thomas R. Lancaster
THOMAS R. LANCASTER

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1480

Lloyd Barrentine; Clyde G. Edwards; Cleo Keeney; Maxie Blanton; Johnny Robinson; J.N. Scates; Charley Deaton; H.E. Mittchell and L.R. Young,	*	
Appellants,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Arkansas.
Arkansas-Best Freight System, Inc.; International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 878, A.J. Pickering, President,	*	
Appellees.	*	

Submitted: December 6, 1979
Filed: February 20, 1980

Before HEANEY and HENLEY, Circuit Judges, and SCHATZ, District Judge.*

*The Honorable Albert G. Schatz, United States District Judge, District of Nebraska, sitting by designation.

HENLEY, Circuit Judge.

This labor case is before us on appeal from a final judgment of the United States District Court for the Eastern District of Arkansas (The Honorable Richard S. Arnold, District Judge) dismissing with prejudice after a substantial bench trial a two-count complaint filed by Lloyd Barrentine, J.N. Scates, and certain other persons against their employer, or former employer, Arkansas-Best Freight System, Inc. Also joined as defendants were Local Union 878 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers and A.J. Pickering who had become president of the local union when this action was commenced in the district court in 1977.[1] For convenience, we will refer to the employer defendant as "the Company" or as "ABF"; and we will refer to the union defendant as the "Union" or as "Local 878."

ABF is a motor carrier of freight. It operates in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission as provided by what until recently was Part II of the Interstate Commerce Act, 49 U.S.C. § 301 *et seq.*[2] The

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[1]The litigation in the district court was commenced originally in 1973, and at that time Odell Smith was president of Local 878. That suit was dismissed without prejudice in 1976 and was duly refiled. Plaintiffs, who are truck drivers, originally sought to prosecute the case as a class action under Fed. R. Civ. P. 23. However, they never asked for a formal certification of the case as a class action, and in a pretrial order entered by the district judge on April 26, 1979 class action certification was refused; that action on the part of the district court is not in issue on this appeal.

[2]Part II of the Act just mentioned has now been superseded by the Revised Interstate Commerce Act that was adopted in the fall of 1978. Act of October 13, 1978, P.L. 95-473, 92 Stat. 1466 *et seq.* We do not understand that the 1978 revision of the statute is material as far as this case is concerned.

Company is a common carrier, and in its operations it makes use of tractors and semi-trailers which at a given time may or may not be in need of repair or adjustment in order to make them safe for over-the-road operations. The Company employs persons in a number of categories of employment, including over-the-road drivers.

During the suit period, ABF and its drivers were subject to the provisions of the Interstate Commerce Act above mentioned, and also to the provisions of the Labor-Management Relations Act of 1947, 29 U.S.C. § 141 *et seq.*, which incorporated the provisions of the original National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ABF was also subject to relevant provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, and as modified by § 4 of the Portal-To-Portal Pay Act of 1947, 29 U.S.C. § 254.

Additionally, under regulations promulgated by the Department of Transportation ABF's over-the-road drivers were required to make pre-trip safety inspections of the respective vehicles assigned to them. 29 C.F.R. §§ 392.7, 392.8 and 396.4 (1977).

ABF has its principal place of business in the City of Fort Smith in the Western District of Arkansas; it also operates a substantial terminal in Little Rock, which is in the Eastern District. Plaintiffs were employed at the Little Rock terminal. They were represented for collective bargaining purposes by Local 878, which is one of the local unions affiliated with the large international union that has been identified and which is generally called the "Teamsters Union."

Over the relevant period of time a collective bargaining agreement was in force between members of the trucking industry, on one hand, and the Teamsters Union and its

locals, including Local 878, on the other hand. ABF and other truckers operating in Arkansas, notably Strickland Transportation Co., were parties to the agreement.

Article 44 of the collective bargaining contract, hereinafter called the Agreement, set out a detailed grievance procedure with binding arbitration by a joint industry-labor grievance committee as a final step.

Under Article 50 of the Agreement, as written, the respective employers were required to pay their employees for all time worked by them in the service of the employer.

An individual employed as an over-the-road truck driver might be required to perform non-driving tasks. In such a situation he was paid at one wage rate for time actually spent in driving and at a lower rate for non-driving time.

The controversy presently to be described arose in connection with the matter of compensation for the Company's Little Rock drivers for time spent in making pre-trip safety inspections and in taking their vehicles to the Company's repair facilities if the inspections developed that the vehicles needed repair.

There were originally nine plaintiffs in the case but as to three of them the complaint was dismissed with prejudice; the case went to trial as to the remaining six, including Lloyd Barrentine and J.N. Scates, the principal complaining drivers.

Prior to the commencement of the action Barrentine and Scates submitted formal grievances; the other driver plaintiffs did not do so. The complaints of Barrentine and Scates, which were representative, went to final arbitration before the joint grievance committee referred to in

Article 44 of the Agreement and were rejected.[3] The case was treated as though Barrentine and Scates had been joined in the grievance-arbitration proceedings by the other four drivers with respect to whom the case went to trial.

An ABF driver employed at Little Rock is required when reporting for duty to "punch in" on a time clock; he then performs certain preliminary functions in the office for which he is paid but not at driving time rates. After the preliminary work is completed, he "punches out" and proceeds to his assigned vehicle or "rig."

Upon locating his rig, the driver makes the required pre-trip safety inspection which consumes only a short period of time. If he finds no defects, he proceeds on his way, and in that case he is paid driving time for all time spent driving. That pay practice is not questioned here.

The problem arises when the driver discovers a defect which under the regulations must be corrected before the actual trip begins. In such a case the driver is required to drive the rig to the Company's nearby repair facility, to "punch in" again on the same or another time clock, and to remain on the premises until the defect in his vehicle is remedied. He then "punches out" and commences his trip. He is paid for the time spent between the second "punch-in" and the second "punch-out," but he is not paid for the time between the first "punch-out" and the second "punch-in." The bone of contention here is the policy of ABF not to pay for the time in question, a policy that was ultimately upheld by the joint grievance committee.

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[3] The district court rejected the defense contention that the four plaintiffs, other than Barrentine and Scates, could not maintain their action because of failure to exhaust the grievance procedure called for by the collective bargaining agreement. That contention has not been renewed here.

During one of the "work periods" in controversy here the driver is required to locate his vehicle, evaluate its condition from the standpoint of safety, and if he finds it defective to drive it to the repair facility. The lengths of these uncompensated periods naturally vary to some extent, but in the nature of things they are not prolonged.

Count I of the complaint is based on the Fair Labor Standards Act, and federal jurisdiction is predicated upon § 16(b) of that Act, 29 U.S.C. § 216(b). The position of plaintiffs is that the time here in controversy is recognized as compensable time by § 4(b) of the Portal-To-Portal Pay Act, *supra,* and that under § 16(b) of the Fair Labor Standards Act plaintiffs are entitled to double damages, to be ascertained by a proper accounting, plus costs and a reasonable attorney's fee.

Count II is based on the Labor Management Relations Act of 1947 that has been mentioned, and federal jurisdiction is predicated on § 301 of that Act, 29 U.S.C. § 185. The charge is that the Union breached its duty to represent the plaintiffs fairly in connection with their controversy with ABF. The heart of the charge is to be found in paragraphs 5 and 6 of Count II, which we set out in full.

> 5. The collective bargaining agreement referred to in COUNT ONE, above, and attached hereto as "Exhibit A", provides for all employees to be paid from the time the employee is ordered to report for work and register in, and ceases at the time they are effectively released from duty. Also, as alleged in COUNT ONE, above, plaintiffs have been refused any pay whatsoever by defendant ABF for the time sought by plaintiffs, and such time has been spent in ABF's service after reporting for work and first registering in. ABF has repeatedly rejected demands of plain-

tiffs for pay for this time. Plaintiffs, and others similarly situated, have repeatedly sought aid and assistance from the defendant Local 878 for their grievances, and have been repeatedly rejected. Plaintiffs allege defendant Local 878 has breached its duty of full and fair representation to plaintiffs by its failure to process their grievances.

6. Plaintiffs have exhausted all other remedies in that defendant Local 878 has refused them full and fair representation with their grievances, and continued and further attempts to seek such would be futile.

Prior to trial the parties entered into a rather full stipulation including a stipulation as to the issues of fact and law that the district court would be required to decide. As far as Count II of the complaint is concerned, the pertinent provisions of the stipulation are as follows:

E. Are the terms of the bargaining agreement binding upon the plaintiffs and are they estopped from proceeding under 29 U.S.C. § 185?

F. Have the defendants breached their duty of fair representation owed to the plaintiffs?

G. Would it have been futile for all plaintiffs to attempt to resolve their complaints through the grievance procedure of the collective bargaining agreement?

H. Has defendant ABF breached the collective bargaining agreement by not paying drivers for the time required to inspect their vehicle and transport it to the repair garage?

At the conclusion of the trial Judge Arnold announced

his decision from the bench, and his announcement amounted to an opinion incorporating his findings of fact and conclusions of law. Materials before us include a transcript of those findings and conclusions, and we have given them careful consideration. As to the findings of fact, we are required to accept them unless clearly erroneous as that term is now commonly understood. Fed. R. Civ. P. 52(a).

The district judge found that if Article 50 of the Agreement were to be read literally, the time in controversy here would be considered as compensable time since although it was the personal responsibility of the drivers to inspect their vehicles before taking them on the road, the initial inspection of the vehicles and the taking of them to repair facility were actions taken in the interest of the employer. There can be little quarrel with that finding.

The district judge also found, however, that collective bargaining contracts are in certain respects *sui generis*, that provisions relative to compensable time are not always to be construed literally, and that in practice there may be room for some elasticity in determining whether a given preliminary or postliminary work activity should be considered as compensable under a given collective bargaining agreement.

Proceeding, the district court found that in industry practice Article 50 of the Agreement has not been construed literally as far as safety inspection time is concerned, and that there is some difference in construction and application between truckers. As far as the ABF Little Rock terminal is concerned, the variance from the literal wording of Article 50 has been tolerated by the Union perhaps as a result of an alleged side agreement between ABF and Odell Smith who for many years was president of Local 878.

The district court held that the controversy about the safety inspection time was properly submitted to arbitration, that the Union breached no duty of representation that it owed to its members, that the awards were legitimate ones and were not tainted by any improper side agreement between ABF and Smith, if there was such an agreement. The court also felt that the awards were binding on all six plaintiffs, and that the complaint of all of them should be dismissed, which was done.

For reversal as to Count I appellate counsel for plaintiffs insist that their claims under the Portal-To-Portal Pay Act were separate and distinct from their claims for compensation under Article 50 of the Agreement, and that the statutory claims should be considered on their merits without regard to the results of the arbitration proceedings.

As to Count II, plaintiffs complain of the awards of the joint committee on a number of grounds.

Basically, plaintiffs contend that it is unfair and contrary to federal labor policy to have individual employee grievances finally arbitrated by a grievance committee made up of representatives of both management and labor unions; that the awards made are squarely contrary to the terms of Article 50 of the Agreement; that the interpretation placed on the contract by the grievance committee is contrary to federal highway safety policy; and, finally, it is contended that the Union did not represent the grievants fairly and in good faith, and that the awards were tainted by the alleged side deal between ABF and Smith.

For affirmance, the defendants urge that some of the contentions of plaintiffs were not advanced in the district court and should not be considered on appeal for the first time. Defendants also contend that all of the complaints

of plaintiffs are, in any event, without merit, and that the decisions of the arbitrators effectively disposed of the respective claims of all of the plaintiffs set out in both Count I and Count II of the complaint.

I.

While the district court did not discuss the two counts of the complaint separately, it is not to be supposed that the court was not aware of the two counts, as such, and was not aware that one of them was based on the Portal-To-Portal Pay Act, and that the other was based on the collective bargaining agreement.

In stating his findings and conclusions the district judge made specific reference to § 203(d) of the National Labor Relations Act, 29 U.S.C. § 173(d). That section is part of Title II of the statute which deals with conciliation of labor disputes and that establishes the Federal Mediation and Conciliation Service, 29 U.S.C. § 171 *et seq.*

Section 203(d) provides that final adjustment "by a method agreed upon by the parties is declared to be the desirable method for settlements of grievance disputes." From that provision the district court concluded that wage disputes arising under the FLSA, as amended and supplemented, may be the subject of binding arbitration where the collective bargaining agreement so provides. We agree, at least in situations in which employees knowingly and voluntarily submit their grievances to arbitration under the terms of the agreement.

Here, the parties to the Agreement are the respective trucking companies, on one hand, and the Teamsters Union and its locals on the other hand. Those parties have agreed that individual employee grievances are to be settl-

ed finally by arbitration under the procedure that we have described.

The position of the plaintiffs is that they may proceed in the federal court on the basis of their statutory claim, notwithstanding the fact that the arbitration proceedings disposed of their contract claims which are coextensive with their statutory wage claims.

Plaintiffs rely heavily on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). Plaintiffs also cite *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975), and *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (Ia. 1971), *cert. dismissed,* 405 U.S. 228 (1972).

Gardner-Denver was a Tenth Circuit case that arose under Title VII of the Civil Rights Act of 1964 and not under the FLSA. It was there held that a person claiming to have been the victim of racial discrimination in employment under the terms of a collective bargaining agreement calling for arbitration of grievances was not put to an election between his contract remedy and his right of action under Title VII, and that an initial resort to arbitration did not prevent him from filing suit under the statute.

The same court of appeals that decided *Gardner-Denver* initially also decided *Satterwhite v. United Parcel Service, Inc.*, 496 F.2d 448 (10th Cir.), *cert. denied,* 419 U.S. 1079 (1974). *Satterwhite* was decided shortly after the Supreme Court decided *Gardner-Denver,* and the court of appeals was well aware of that decision. The court of appeals distinguished a simple wage claim of an employee and an employee claim of racial discrimination prohibited by the 1964 Civil Rights Act. It was held that where an employee involved in a wage dispute voluntarily submits a grievance under the collective bargaining agreement, and where the grievance goes to final arbitration, and the employee loses,

he cannot turn around and commence a suit under § 16(b) of the FLSA.

We think that the *Satterwhite* distinction is sound. In a context of racial discrimination the right of an employee to be free from such discrimination may well be thought to stand in more need of protection than conventional arbitration of a simple wage dispute may provide.

Satterwhite was cited with approval in *Union de Tronquistas de Puerto Rico Local 901 v. Flagship Hotel Corp.*, 554 F.2d 8, 11 (1st Cir. 1977).[4] *See also Bell v. IML Freight, Inc.*, 589 F.2d 502, 504 (10th Cir. 1979); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977).

Thompson v. Iowa Beef Packers, Inc., supra, and *Leone v. Mobil Oil Corp., supra,* hold that where an employee has a claim under the FLSA which is also subject to arbitration under a collective bargaining agreement, he is not required to exhaust his remedies under that agreement, including final arbitration, before filing his suit under § 16(b).

Those holdings might well give us trouble here, at least with respect to the four plaintiffs who never filed grievances and never submitted their claims to arbitration except for the manner in which the case was handled in the district court.

We have mentioned the fact that the district court rejected the defense claim that the four men in question could not proceed in the case since they had not exhausted their contract remedies. In so doing, the district court stated that it was doing so on the ground that it would

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[4]Our former colleague, the late Judge Van Oosterhout of Iowa, sitting in the First Circuit by designation, wrote for the court.

have been a futile gesture for the four men in question to have filed grievances and gone to arbitration in view of the action that the grievance committee had already taken in the cases of Barrentine and Scates. And the district judge stated specifically that he was "treating the case as though each of the named plaintiffs had actually filed grievances which were considered and denied."

Trial counsel for plaintiffs did not object to that approach, and appellate counsel have not undertaken in connection with this appeal to differentiate the Count I claims of Barrentine and Scates from the Count I claims of the other four plaintiffs.

We conclude, therefore, on this phase of the case that if the district court correctly disposed of the Count II claims, then Count I falls with Count II.

II.

We consider, next, plaintiffs' claim that to uphold the award in this case would seriously offend a strong public policy of the government that the vehicles of motor carriers be safety inspected and, where necessary, be placed in a safe condition before the vehicles are put on the highways.

Assuming, contrary to the contention of the defendants, that this claim is properly before us, we find it to be without merit.

No one would deny that such a policy exists, and that it is a legitimate and a strong one. The policy, however, relates to the condition of the vehicles and does not amount to a requirement that the drivers who are required to make the inspections in advance of trips be paid for the short periods of time required to make the inspections and

drive the vehicles to nearby facilities when found to be in need of repair. After all, the policy is designed for the welfare of the drivers as well as for the benefit of employers and third party members of the traveling public.

III.

Before discussing the validity of the particular arbitration awards that were made in this case, we will take up the plaintiffs' underlying argument that it is inherently unfair and contrary to federal labor policy to submit individual employee grievances to arbitration by panels made up of representatives of management and organized labor even though an effort to achieve impartiality is made by a requirement that neither the employer nor the local union involved in the particular dispute to be submitted is to be represented on the arbitration panel.

While the defendants strongly urge that this contention is not properly before us for consideration, we will assume *arguendo* that it is.

A forceable argument can be made, and has been made here, that the kind of arbitration in question is subject to grave abuses, including, notably, collusive secret agreements between employers and unions as a result of which the interests of individual employee grievants may be sacrificed to arrangements that management and union labor may consider to be in their own broader interests.

This method of arbitration, which is widely used to settle individual employee grievances arising under contracts to which locals of the Teamsters Union are parties, has been criticized on account of the possibility of abuses just mentioned. *See General Drivers & Helpers Union, Local No. 554 v. Young & Hay Transp. Co.*, 522 F.2d 562, 567,

n.5 (8th Cir. 1975). *See also* Feller, "A General Theory of the Collective Bargaining Agreement," 61 Cal. L. Rev. 663, 836-38 (1973); Azoff, "Joint Committees As An Alternative Form of Arbitration Under The NLRA," 47 Tul. L. Rev. 325 (1973).

However, as of this time the law seems to be established that the joint committee method of arbitration is valid, and that committee awards are final and enforceable so long as the unions involved do not breach the duty of fair representation owed to union members and so long as the awards do not radically depart from the terms of the collective bargaining agreements involved. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Humphrey v. Moore*, 375 U.S. 335 (1964); *General Drivers, Warehousemen & Helpers Local Union No. 89 v. Riss & Co., Inc.*, 372 U.S. 517 (1963).

In view of this state of the law plaintiffs' attack on joint committee arbitration in general must be rejected.

IV.

Finally, there remains to be considered the claims of the plaintiffs that the Union breached its duty of fair representation, that the award flies in the face of Article 50 of the Agreement, and that the awards of the committee were tainted by a collusive side deal between ABF and former president Smith of Local 878.

In evaluating those claims we must recognize at the outset that it is not our function to substitute judicial views for those of an arbitrator as far as the merits of the controversy are concerned, *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 562-63, and that arbitration as a method for the peaceful settlement of labor disputes arising in or affecting interstate commerce has

been a favorite of the federal courts since at least 1957 when the Supreme Court decided *Textile Workers Union of America v. Lincoln Mills,* 353 U.S. 448 (1957). *See also* the familiar "Steelworkers Trilogy." *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

As to the claim of the plaintiffs that the awards in question impermissibly violate the terms of Article 50 of the Agreement, it is sufficient for us to say that we agree with the district court that given the flexibility that must be accorded to collective bargaining agreements, the exclusion of the short periods of work activity involved in this case from compensable time under Article 50 was not such a departure from the terms of the agreement as to nullify the awards.

The questions raised by the other claims that we are now considering were primarily factual, and the district court resolved them adversely to the plaintiffs.

The district court found that during the overall period of controversy that began about 1969 there was a good deal of animosity between Barrentine, Scates and perhaps other ABF drivers and President Smith of Local 878 that extended until Smith was defeated for reelection by the defendant Pickering. While the district judge made no firm finding on the matter, he thought it probable, and he assumed that there had been a side deal of some sort between ABF, on one hand, and Mr. Smith on the other. The district court was unable to find that there was anything improper or collusive in the agreement, if there was one, but the court for purposes of decision appears to have

assumed to a limited extent the existence of at least some degree of impropriety.

The court found, however, with respect to the presentation of the grievances to the joint grievance committee the Union had not breached any duty owed to its members and had not presented the grievances in a merely perfunctory or pro forma manner, and the district judge found that the awards directly involved and, indeed, earlier awards had not been tainted by any improper agreement between ABF and Smith, if there was one.

In sum, Judge Arnold found that the awards adverse to the plaintiffs were valid and were binding upon them, and that the case had to be dismissed in its entirety as to all six plaintiffs.

Counsel for plaintiffs do not challenge the factual findings of the trial court, and certainly they were not clearly erroneous. We likewise think that the trial court's conclusions of law were permissibly based on the record before it and do not represent error.

As indicated, if Count II of the complaint goes down, Count I falls with it. Accordingly, we affirm the judgment of the district court as to both counts.

HEANEY, Circuit Judge, dissenting.

I dissent from that portion of the majority opinion holding that the validity of the plaintiffs' claim under the Fair Labor Standards Act (FLSA), 29 U.S.C. §201, *et seq.*, depends upon the validity of their claim under the collective bargaining agreement. In my view, the Supreme Court's conclusions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), regarding Title VII claims apply with equal force to claims arising under FLSA; an employee's FLSA claim is not precluded by prior submission of his

claim to arbitration under a collective bargaining agreement, unless the parties clearly and specifically consented to have the FLSA claim decided by the arbiters.

In this case, there was no intent to submit the FLSA claim to arbitration and it was not submitted to arbitration. Accordingly, I would remand to the district court for a determination of the validity of plaintiffs' FLSA claim.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1480 September Term, 1979

Lloyd Barrentine; Clyde G. Edwards; Cleo Keeney; Maxie Blanton; Johnny Robinson; J.N.Scates; Charley Deaton; H.E.Mittchell and L.R. Young,
Appellants,

vs.

Arkansas-Best Freight System, Inc.; International Brotherhood of Teamsters, Chauffeurs and Warehousemen, Local 878, A.J. Pickering, President,
Appellees.

APPEAL FROM the United States District Court for the Eastern District of Arkansas.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Arkansas and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the opinion of this Court.

February 20, 1980

Cost taxed in favor of appellee:

Cost of printing 5 copies of brief:	$20.25
Total costs of appellee for recovery from appellant in the U.S. District Court	$20.25

(PLEASE PAY COST DIRECTLY TO PARTIES INVOLVED)

A true copy: /s/ Robert D. St. Vries

Attest: /s/ by Linda Landiochi, Deputy Clerk
Clerk, U.S. Court of Appeals, Eighth Circuit

DATED: March 18, 1980